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In the Supreme Court of the United States

OCTOBER TERM, 1979

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY,
Appellant,

v.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Appellee.

Reply to Amicus Brief of United States

On Appeal from the Court of Appeal,
Second Appellate District, State of California

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INTRODUCTORY STATEMENT

In response to the Court's invitation of May 12, 1980, the United States has filed a brief as *amicus curiae* in support of appellant, The Western and Southern Life Insurance Company (hereinafter "Western and Southern"). Although that brief deals with areas which have already been discussed in the Motion to Dismiss or Affirm (hereinafter cited as "Board's Motion") of appellee State Board of Equalization (hereinafter "the Board"), the United States' brief does so in such a manner as to give the impression that new ground is being broken. Therefore, reassertion of a few basic principles might be in order to clarify the issues.

ARGUMENT

1. Congress Has the Power to Remove All Commerce Clause Restrictions on State Taxation of Insurance Companies; This Court Has Held In Prudential v. Benjamin that in the McCarran Act Congress Exercised that Power.

A reading of the brief of the United States leaves one with the impression that there can be a violation of the commerce clause even when Congress has attempted to exempt the states from all commerce clause restraint in the particular area involved, and that in the McCarran Act Congress did not make such an attempt as to the states' taxation of insurance business. However, any such impression is dispelled by an actual reading of Supreme Court decisions cited by the United States.

Lewis v. BT Investment Managers, Inc. (1980) .... U.S. ...., 48 U.S.L.W. 4638, is cited on pages 11 and 12 of the United States brief; yet the United States fails to note that *Lewis* is the most recent decision of this Court which recognizes that Congress may exempt whole areas of the law from commerce clause coverage:

> "Congress, of course, has power to regulate the flow of interstate commerce in ways that the States, acting independently, may not. And Congress, if it chooses, may exercise this power indirectly by conferring upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy. See *H. P. Hood & Sons, Inc. v. Du Mond,* 336 U. S., at 542-543; *Prudential Insurance Co. v. Benjamin,* 328 U.S. 408, 423-424 (1946); *International Shoe Co. v. Washington,* 326 U.S. 310, 315 (1945)." *Id.* at ....; 48 U.S.L.W. at 4643.

This Court's citing of *Prudential v. Benjamin* is notable, for in *Benjamin* this Court held that Congress had the power

to release all state taxation of insurance business from commerce clause restraints. 328 U.S. 408, 427, 433-36.

Once Congress' power is established, the only remaining commerce clause question in this matter is whether by the McCarran Act Congress fully exercised this power as to insurance taxation by the states. Again *Prudential v. Benjamin* provides unequivocal precedent. In the *Benjamin* case this Court considered the McCarran Act's provision (59 Stats. 33, 34 (§ 2(a)), 15 U.S.C. § 1012) that "the business of insurance . . . shall be subject to the laws of the several states which relate to the regulation *or taxation* of such business" (emphasis added); this Court held that Congress had "clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for." 328 U.S. 408, 431. There are no exceptions stated within the McCarran Act which would apply in the current case.[1]

Given these clear holdings, there is no point discussing authorities which have dealt with situations where Congress did not exercise its commerce clause exemption power to

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1. On pages 12 through 16 of the United States' brief *amicus* takes great pains to establish that the McCarran Act was only meant to reestablish what the state of the law had been before the decision in *United States v. South-Eastern Underwriters Ass'n* (1944) 322 U.S. 533. Such a proposition would not hurt the Board's position: *South-Eastern* recognized that for the previous seventy-five years this Court had held that the commerce clause did not affect state taxation of insurance business, based on the proposition that " 'the business of insurance is not commerce' ". *Id.* at 534, 543-44. The *Benjamin* decision notes that, before *South-Eastern*, the negative implications of the commerce clause had become irrelevant for the valid exercise of state taxing authority regarding the business of insurance, 328 U.S. at 416. Thus before *South-Eastern* there would have been no question under the commerce clause regarding the insurance taxation involved in this case.

the extent it did in the McCarran Act. Thus most of the cases cited on pages 10 through 12 of the United States' brief are simply inapplicable and need not be further analyzed here.

2. The Holding in Prudential v. Hobbs Directly Applies here to Uphold the Retaliatory Tax Against Attacks Made in the Name of the Commerce Clause.

As pointed out in the Board's motion (pp. 5-8), in *Prudential Insurance Co. v. Hobbs* (1946) 328 U.S. 822, this Court, in a *per curiam* decision citing the *Benjamin* case, affirmed a Kansas decision which upheld a comparative retaliatory insurance tax against a commerce clause attack. The United States' brief (p. 16) attempts to convince this Court that in 1946 this Court did not realize what it was doing when it made its *Hobbs* ruling. The Board believes that it is clear that this Court meant to do just what it did: to apply the principles of the *Benjamin* case involving the McCarran Act in upholding the validity of a comparative retaliatory tax[2] against an attack made in the name of the commerce clause.

3. There is no Substantial Equal Protection Question.

The United States attacks the California insurance retaliatory tax under the equal protection clause on the bases that Western and Southern had been granted a license of indefinite term before the California retaliatory tax was reimposed (U.S. Brief p. 8; see also Western and Southern's latest brief, p. 2) and that the tax supposedly was imposed upon Western and Southern merely "because it is a foreign

2. At least the United States does not join Western and Southern in taxpayer's desperate attempts (J.S. 14-15, Western and Southern's latest brief, pp. 2-4) to establish that the Kansas statute was somehow not the same type of retaliatory tax which is presently at issue. See Board's Motion pp. 6-8.

corporation." (U.S. Brief, p. 9; see also Western and Southern's latest brief, p. 7.) Neither of these alleged foundations are sound. As to the first, if the United States is aware that Western and Southern's certificate of authority to transact California insurance business is for an indefinite term, the United States must also know that this certificate states that such admission to do business is "expressly conditioned" upon conformance with the California laws then in effect *and* as they may thereafter "be changed or amended." This explicit condition destroys any arguments based on the indefinite term of Western and Southern's certificate of authority. *See Lincoln Life Ins. Co. v. Read* (1945) 325 U.S. 673, 676 (privilege tax imposed only on foreign states' insurance companies).

The California retaliatory insurance tax is not imposed upon Western and Southern solely because it is a foreign corporation. The United States' brief ignores the authorities cited on pages 9 through 11 of the Board's motion, which establish that the purpose of such retaliatory laws is not to discriminate but to encourage interstate insurance business by equalizing the insurance tax burdens of the various states and secure reciprocity and uniformity of treatment.[3] In doing so, comparative retaliatory statutes such as California's do not classify all out-of-state insurers together as the federal brief claims; instead, a comparative retaliatory tax statute such as California's separately classifies each insurer by the way that insurer's home state would

3. This purpose of encouraging the doing of interstate insurance business distinguishes this case from the United States' attempted analogy involving hypothetical general real property tax retaliation (U.S. Brief p. 9). Further, as noted in *Atlantic Ins. Co. v. State Board of Equalization* (1967) 255 Cal.App.2d 1, 15, 62 Cal. Rptr. 784, the insurance tax rates of the various states are relatively uniform, thus indicating that the purpose of the retaliatory insurance statutes has been realized.

treat a similar insurer from the state having the retaliatory statute. See Board's Motion, pp. 9-11. As demonstrated by *Franklin Life Ins. Co. v. State Board of Equalization* (1965) 63 Cal.2d 222, 232-33, 404 P.2d 477-485 (discussed in Board's Motion pp. 9-10 and n. 7), such a comparative test does not even classify all insurers from the same state together; given the nature of the test in satisfying the intent behind the statutes, some insurers from one state may be subject to the tax while others from the same state are not.

The authorities presented by the United States to support its equal protection arguments are inapposite. *Toomer v. Witsell* (1948) 334 U.S. 385, 395-407 (cited U.S. Brief p. 9) explicitly eschews reliance upon the equal protection clause (*id.* at 403) in basing one of its holdings on the privileges and immunities clause; it is elementary that corporations such as Western and Southern are not "citizens" entitled to the protection of the privileges and immunities clause. *Asbury Hospital v. Cass County* (1945) 326 U.S. 207, 210-11; *Paul v. Virginia* (1868) 8 Wall. 168, 177. The other holding in the portions of *Toomer* cited by the United States concerned the commerce clause, with no mention of the equal protection clause. *A&P Tea Co. v. Cottrell* (1976) 424 U.S. 366 (cited U.S. Brief p. 9) is another commerce clause case wherein this Court explicitly declined to consider an equal protection claim. *Id.* at 368 n. 3. One of the basic grounds distinguishing the comparative retaliatory insurance tax statute from the cases cited in the first incomplete paragraph of page 10 of the United States' brief is the fact, discussed above, that the insurance retaliatory tax treats each out-of-state insurer individually and does not unreasonably classify all foreign insurers or insurers from each state together.

With regard to the application of the equal protection clause to the California principal office deduction, which until its 1976 repeal was a part of the California gross premiums privilege tax, the Board has already referred (Board's Motion, p. 13) to the applicable line of cases which authorizes the imposition of new privilege tax burdens on foreign corporations without imposing equivalent burdens on domestic corporations. However, detailed discussion of these cases is not necessary here, for (as shown on pages 11 through 13 of the Board's Motion) once the constitutional validity of the California retaliatory tax is established, the interrelated nature of that tax with the gross premiums tax provides an adequate state ground which relieves this Court of jurisdiction to determine the constitutional validity of the principal office deduction. Neither the United States' brief nor Western and Southern's brief in opposition to the Board's motion to dismiss or affirm challenges the Board's approach as to the applicability of the adequate state ground jurisdictional bar.

CONCLUSION

Given the established current state of the law there is no substantial federal question presented by this case. If, as Western and Southern suggests, this Court should consider overruling its decision in *Prudential Insurance Co. v. Hobbs* and reconsidering the entire basis for its decision in *Prudential Insurance Co. v. Benjamin,* the case would become an important one of great interest to the forty-nine states which have comparative retaliatory insurance tax statutes.[4] However, it is respectfully submitted that the

4. The Board's motion (at p. 11 n. 9) states that "[f]orty-nine of the fifty states currently have insurance retaliatory taxes; *all* of those taxes are of the purely 'comparative' type . . . ." Appendix B to the Board's motion sets forth the statutes of the 49 states which support said statement. Said appendix notes that the New Mexico

reasoning forming the basis of the *Benjamin* decision is undeniably sound and that its application to the comparative retaliatory statute in *Hobbs* was equally consistent and appropriate. Western and Southern and, more particularly, the Solicitor General of the United States, should be aware that this Court has enough to do without reconsidering precedents, such as *Benjamin* and *Hobbs,* which were sound

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statutes pertain to insurance brokers and insurance agents respectively. Hawaii is the one state not represented on the list, consistent with our statement that one state does not currently have a retaliatory tax statute. On page 5 of its brief in opposition Western and Southern claims that the statements quoted above are "clearly erroneous" on the basis that "[n]o such taxes upon foreign insurance *companies* exist in New Mexico, North Carolina and Hawaii." (Emphasis added.) As noted above and in the Board's motion, Hawaii indeed has no such tax, and the insurance retaliatory taxes imposed by New Mexico are upon insurance brokers and agents respectively and not directly upon the insurance companies. These facts are not contrary to the Board's statements. Similarly, Florida Statutes section 624.429 imposes a purely comparative retaliatory tax in that it does not require discrimination by the insurer's home state to trigger its application; the fact that the Florida statute has an exception pertaining to foreign insurers with regional home offices in Florida (see Western and Southern's latest brief, p. 5) does not change this fact. As to North Carolina, the terms of the statute (N.C. Gen. Stat. § 105-288.8) quoted and relied upon by Western and Southern on page 5 of its latest brief only deal with increases of fees or taxes "imposed in this article". Section 105-228.8 is in chapter 105, article 8B of the North Carolina General Statutes; North Carolina's insurance retaliatory law (§ 58-152) is in chapter 58, article 17 of the North Carolina General Statutes. Additionally, section 58-152 has remained in effect since section 105-228.8 was enacted in 1945. Although it was reasonable under these circumstances to conclude that North Carolina law still would impose the retaliatory tax, it is understood from September 1980 conversations with North Carolina Department of Insurance authorities that said Department has exercised statutory discretion by not actually collecting the comparative retaliatory taxes provided for in section 58-152. At best Western and Southern's attack on the Board's statement has achieved partial adjustment only as to North Carolina; it would be most accurate to say that 49 of the 50 states have comparative retaliatory statutes in effect, and 48 of those 49 comparative retaliatory taxes are collected when applicable. Thus 96% of the states are collecting comparative retaliatory taxes whenever their statutory conditions are satisfied.

at their birth and which have not been weakened by any related line of cases or other subsequent developments.

For the reasons set forth above and in the Board's motion to dismiss or affirm, it is respectfully submitted that this Court should dismiss the appeal or, in the alternative, affirm the decision of the California Court of Appeal.

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Respectfully submitted,

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